

In accordance with notice to members of the Rhode Island Coastal Resources Management Council, a meeting was held on Tuesday, March 23, 2010 at 6:00 p.m. in Conference Room A, Administration Building, One Capitol Hill, Providence, RI.

Members Present

Michael M. Tikoian, Chair
Paul Lemont, Vice Chair
Dave Abedon
Raymond Coia
Don Gomez
Michael Sullivan, DEM
Bob Driscoll

STAFF PRESENT

Grover J. Fugate, Executive Director
Jeffrey M. Willis, Deputy Director
James R. Boyd, Coastal Policy Analyst
Laura K. Miguel, CRMC Enforcement Officer
Brian A. Harrington, CRMC Enforcement Officer
Brian Goldman, Legal Counsel

1. Chair Tikoian called the meeting to order at 6:00 p.m. and made opening statement.

2. APPROVAL OF THE MINUTES OF THE PREVIOUS MEETING:

Vice Chair Lemont motioned, seconded by Mr. Coia, to approve minutes of previous meeting, March 9, 2010. Vice Chair Lemont also asked for correction of page 3 of 3 of the minutes to reflect that the Council went into Executive Session and then back to open meeting, then adjourned. Minutes approved with correction on a unanimous voice vote.

3. SUBCOMMITTEE REPORTS

Vice Chair Lemont read out program changes that were approved by Policy and Planning Subcommittee at their March 16, 2010 Subcommittee meeting so rule-making could begin: RICRMP Section 210.3.C.4 Coastal Wetlands; RICRMP Section 300.14 Maintenance of Structures; RICRMP Section 335.C.2 Protection and Enhancement of Public Access to the Shore; Maps of Water Type Designations. Chair Tikoian stated that they would be put out to Public Notice and brought back before the Council for consideration.

4. STAFF REPORTS

Mr. Fugate stated that the following week there would be a presentation on marine mammals & fisheries and fishery impacts in terms of impacts from renewable energy, particularly wind farms, by two European researchers that have been working on the Ocean SAMP, one from SEFIS and one from a research institution. The presentation was scheduled for Wednesday, March 31st at 7:00 p.m. in the Auditorium of the Coastal Institute.

Mr. Goldman reported that the Federal District Court had handed down a favorable decision to the Council in the Downing/Salt Pond multi-million dollar takings case against CRMC and the State of Rhode Island. Mr. Goldman stated that the Attorney General's office worked with him diligently on a Motion to Dismiss based on the fact that CRMC had not yet acted on Downing's Assent Extension request therefore a takings claim was inappropriate. Mr. Goldman and Chair Tikoian both thanked the Attorney General's office for their cooperation.

5. Continuances

Chair Tikoian stated that the Gunter Hafer application (2006-04-062) had been granted a continuance upon the timely receipt of continuance request.

6. Reconsideration of Decision Motion

Director Sullivan stated that he felt that CRMC in its decision regarding the water type changes of the East Providence Quadrangle caused an adversity to ongoing commercial operation of Capital Terminal Corporation. Director Sullivan urged the Council to adopt the recommendation of CRMC staff and asked Jim Boyd to present. Mr. Boyd gave brief overview of the series of events leading to this meeting stating that staff recommendation was for Type 6 waters to remain as is at Bold Point and Wilkes-Barre Pier. Mr. Boyd stated that the Type 6 designation was revised to Type 5 designation along the so-called green shoals. Mr. Boyd handed out visual aid to Council stating that it had also been e-mailed to the City of East Providence and Capital Terminal Corporation. Mr. Boyd explained the aerial photos to the Council stating that an easement exists for CTC across a parcel of land with a pipeline that runs almost two miles up Dexter Road where the tanks are located. Vice Chair Lemont expressed displeasure in the reconsideration of this matter stating that the new water type designation was important to the City of East Providence's comprehensive plan to have redevelopment along the shoreline not just on an industrial basis. Director Sullivan and Mr. Boyd proposed an alternative which would adjust the Type 5 water classification entirely out of the commercial facilities waters; many references made to the magenta line on the aerial photo. Chair Tikoian suggested sending the change back to Policy and Planning where they could meet with the parties of interest to resolve the matter. Mr. Gomez asked for clarification of the suggested lines. Mr. Sullivan, using the aerial photo, explained where the new lines would be. Discussion on water depth in this area. Chair Tikoian opens the floor for public comment. Todd Turcotte from the Capitol Terminal Company stated that he provided the aerial photo to staff and further explained the lines; also stating that in the shoaled area the water depth is about four feet at low tide and that construction equipment is used there when doing repair work on the pier. Mr. Turcotte to provide CRMC via Brian Goldman with documents giving the CTC a 150-foot wide ship berth in that area at the end of the pier. Chair Tikoian asks staff to provide Council with another map that shows the boundary lines of the properties and how the boundary lines interact with what's offshore.

Chris Hunter, Providence Waterfront Alliance in the Port of Providence, spoke. Mr. Hunter spoke of the importance of Water Type designation.

Wendy Waller, Save The Bay, spoke about proper public notification of subject being discussed.

Jeanne Boyle, Planning Director for the City of East Providence, commented that she was not aware that the issue was being revisited and thought it was only a reconsideration or clarification of vote taken by Council at its previous meeting. Ms. Boyle stated that she and Mr. Turcotte had been in communication that day and had talked about the adjustment of the line from Type 6 to Type 5.

Director Sullivan motions tabling the matter for one month so that legal documentation can be provided for Brian Goldman and so that the two parties can work with staff to come to a consensus resolution. Vice Chair Lemont seconded the motion. Motion to table the matter carried on unanimous voice vote.

6. Before the Full Council for Enforcement and Removal order for unpermitted marina in tidal waters:

07-0028 Harris Marina – Located at plat 999, lot 99; Rocky Hollow Road, East Greenwich, RI.

Grover Fugate, CRMC's Executive Director, Laura K. Miguel and Brian A. Harrington, of CRMC Enforcement are sworn in. Mr. Harrington gave a brief overview of enforcement situation to the Council stating that the Harris Marina is an unauthorized marina located at the terminus of Rocky Hollow Road in East Greenwich, RI. Mr. Harrington stated that a Cease and Desist Order was issued to Ken Harris for the

unauthorized marina. Mr. Harrington pointed out that CRMC staff has been unable to identify prior authorization for a marina at this site using CRMC records, previous Harbors and Rivers permit or previous Army Corps of Engineers permit. Mr. Harrington stated that a review of aerial photographs showed that there is no photographic evidence of a marina at this location prior to 1981. Mr. Harrington stated that CRMC staff recommendation is to issue an order of removal of marina at this site allowing reinstallation only after proper authorization from the CRMC has been obtained. Ms. Miguel added that they were called out to the site for a separate matter and after researching the Cease and Desist was issued. Ms. Miguel explained that Mr. Harris has been to the office to try to comply with CRMC regulations but has not been able to provide CRMC with proof of ownership which is a necessary piece of the application package. Ms. Miguel stated that this will be the third season that the marina is being operated unauthorized with CRMC being aware, and that staff hopes for a resolution for this coming summer season. Mr. Goldman clarified documents and photographs in the agenda package for Council members stating that the evidence of the marina appeared after the formation of the Council thereby requiring a permit for the marina and operation. Mr. Goldman stated that unless Mr. Harris can provide an Army Corps of Engineers permit, staff would like to see an order to remove any structures that are still in the water and an order prohibiting a marina from being reinstalled unless they can get a CRMC permit. Mr. Fugate stated that the situation began with a series of enforcement actions that have been occurring in Greenwich Cove with several marinas being cited and have gone through the permitting process for proper authorization. Mr. Fugate reiterated our research of previous permit for Harris Marina stating that our file system dates back to the late 1700s (in a few cases) and definitely from late 1800s. Mr. Fugate stated that ACOE has a grandfather permit process and if proof can be found that Harris Marina was in there prior to 1961, then we could start working on the CRMC permit. Mr. Fugate stated that one of the problems with Harris Marina is that it emanates off of property owned by the Town of East Greenwich which is also a CRMC designated ROW, therefore. Mr. Harris cannot provide proof of ownership. Mr. Fugate stated that we requested a lease or some sort of permissive document be produced so that we know the Town acknowledges that the marina exists and is okay with its operation in that location. Mr. Fugate stated that the marina has encroached over other riparian areas and that the actual marina (if allowed) would be much smaller. Chair Tikoian asked for a clarification for the record of a designated right of way. Mr. Fugate explained the designation process stating that research is done, hearings are held, testimonies and comments are received which would ultimately lead to a decision by CRMC that the area is a right-of-way. This decision is then sent out for appeal and if no appeal sought then it is registered with Secretary of State's office as a designated right-of-way. Director Sullivan stated that last June DEM's Office of Compliance and Inspection investigated an illegal discharge from the cesspool on the site. Director Sullivan stated that Mr. Harris was compliant and removed the bathroom facilities and capped off the pipe. Director Sullivan stated that a DEM water quality certification would also be required for the Marina.

Ken Harris as well as Attorney Casby Harrison present. Mr. Harrison gives a brief history of Mr. Harris' situation stating that he is 75 years old and has lived on Rocky Hollow Road his entire life. Mr. Harrison stated that in 1979 Mr. Harris purchased the 1930's shanty that is located on the ROW. Mr. Harrison stated that the shanty was present when the CRMC researched the ROW and when the subcommittee made their decision to designate the ROW. Mr. Harrison stated that there is confusion as to where the ROW is actually located as the marker is placed 29 feet to the right of the Mr. Harris's structure and that the land area has changed since the ROW was designated. Mr. Harrison stated that Mr. Harris has always provided public access from his property, inviting the public to recreate. Mr. Harrison stated that Mr. Harris has an overwhelming amount of support from neighbors and residents in East Greenwich who utilize his low cost docking space. Mr. Harrison stated that Mr. Harris was informed by Mike Elliott of the ACOE that the marina would be eligible to be grandfathered under the ACOE program. Chair Tikoian stated that CRMC would need to see that documented from ACOE. Mr. Harrison stated that his client should be allowed to apply for an assent for the marina and that an exception to the time should be allowed in light of the fact that Mr. Harris was not notified of the 1984 ROW subcommittee hearing or the designation of the ROW. Mr. Harrison stated that the marina is between two marinas making it consistent in this area. Mr. Harrison stated that he did not have paperwork documenting the legality of the marina but that his client had been in contact with CRMC but was turned away due to the ownership of the land.

Mr. Fugate stated that one of the main issues with Mr. Harris applying for the marina is that proof of ownership or agreement with the Town is a necessary element to the application process.

Mr. Goldman clarified that there were two issues associated here; the first being the alleged blocking of the Right of Way and the second being the in-water marina which appears to not have any type of permit from CRMC or ACOE. Mr. Goldman stated that the recommendation by staff is the removal of the marina and that when that is figured out, the issue of the structure blocking the ROW can be reviewed. Mr. Goldman clarified that CRMC has exclusive jurisdiction over anything that relates to activities below the Mean High Water mark so that the first issue they should look at is the removal of the marina.

Chair Tikoian asked Mr. Harrison about the filling that had been done to the area that Mr. Harris said he had permission for. Mr. Harris was put under oath. Mr. Harrison questioned Mr. Harris about the application process he went through to fill in the land at the end of Rocky Hollow Road. Mr. Harrison read the application which said the project was to maintain a 24-inch diameter drainage pipe that discharged in East Greenwich Cove. Mr. Harris stated that the application was stamped and he assumed that meant approved. Mr. Harris explained the maintenance project. Mr. Goldman marked documents as Harris 1, 2, and 3. Mr. Fugate responded to Mr. Harris' documents by saying that the document is an application with a "Received by CRMC" stamp but that there is no proof that it was acted upon by CRMC staff because an assent for this location cannot be found.

Peter Clarkin, East Greenwich Town Solicitor, was present on behalf of the Town of East Greenwich. Mr. Clarkin stated that the Town had not conducted a hearing on permitting the structure. Mr. Clarkin stated that the land is owned by the Town and that Mr. Harris has just been permitted to utilize the shanty on the Town land. Mr. Clarkin stated that the shanty was purchased by Mr. Harris and the Town has permitted use of that shanty on Town land. Mr. Clarkin stated that the Town was leaving to the CRMC the task to determine the marina and use of the marina and appropriateness of marina; and, if at some point Mr. Harris is given the opportunity to apply to CRMC for the marina, the Town would have a full hearing on the use of that structure as there are some local issues that need to be addressed. Chair Tikoian asked Mr. Clarkin about the two letters from the Town citing violations. Mr. Clarkin stated that the Town decided to step back from their issues with the site and let CRMC figure out the marina legalization. Mr. Clarkin stated that the Town had no objection to Mr. Harris continuing his operation of a marina at the site as long as it complies with all applicable rules and regulations. Director Sullivan asked Mr. Clarkin if the Town would allow a use agreement with Mr. Harris if compliance was ascertained. Mr. Clarkin stated that the Town would entertain a request and that it would be up to the Town Council to decide the outcome. Director Sullivan stated that CRMC cannot consider the legality of the marina in the water until the legal right of use is established. Director Sullivan suggested that CRMC send a specific letter to the Town Council asking them the question of entering into a use agreement with Mr. Harris if all local rules and regulations were complied with. Mr. Fugate stated that the first thing that needs to be done is for Mr. Harris to obtain a use agreement with the Town so that CRMC can even entertain receipt of application from Mr. Harris. Mr. Fugate also stated that the marina is sitting in Type 1 waters and without some pre-application or recognition from the ACOE that he is grandfathered in, Mr. Harris can't qualify for a marina in Type 1 waters in today's regulatory environment. Mr. Harrison stated that he is optimistic that Mr. Harris can receive a grandfather permit from ACOE and a lease from the Town of East Greenwich and he asks that status quo be maintained while in pursuit of those options. Mr. Harrison asked that Mr. Harris be able to operate as it is his primary source of income. Motion made by Director Sullivan to table the matter, not allowing the docks to be replaced nor the operation of the marina until Mr. Harris pursues all local and federal approvals and applies to CRMC. Motion seconded by Mr. Driscoll.

Attorney John Boehnert was present representing abutter to the south, Anderson's Boatyard, and abutter to the north, Andrew Craig. Mr. Boehnert agreed with Mr. Goldman stating that relitigation of closed ROW proceeding inappropriate for the night's meeting. Mr. Boehnert stated that Mr. Harris new about CRMC rules and regulations throughout the term of his operation and chose to ignore them as well as the Cease and Desist Order telling him to stop the operation of the marina. Mr. Boehnert stated that Mr. Harris' marina impinges on the riparian rights for both Mr. Anderson and Mr. Craig and he would like the operation of the marina to cease and the floats are not to be installed until such time Mr. Harris obtains local, state and federal permits.

Mallorie Walsh, resident of East Greenwich, is sworn in to speak on behalf of Ken Harris stating that the Town Council is willing to work with Mr. Harris. Ms. Walsh stated that no entertainment or parties go on at the facility. Ms. Walsh also stated that there was never a reason to question the placement of the ROW marker which was placed on Mr. Anderson's property. Mr. Harrison stated that when he went to the Town Clerk to gain ownership papers, there was no evidence that the marina structure was owned by the Town causing confusion as to the ownership of the land under the water. Mr. Harrison stated that Mr. Boehnert's comments were from economic competitors of Mr. Harris and both arrived at that location after Mr. Harris was already there, already knowing his dock placement. Mr. Harrison stated that the comments were not motivated by the desire to protect the general public or the right-of-way. Mr. Harrison stated that Mr. Harris should be allowed to operate his marina while pursuing the required permits as the operation of the marina does no harm to anyone.

Director Sullivan renewed and clarified his motion to table until such time as we see the adequate and necessary documentation from the Town that a use agreement of some kind empowers Mr. Harris to come before the Council and then also the necessary information from the ACIE and until such time the actions and the recommendations of staff as far as the cease and desist should stand prohibiting Mr. Harris from installing the floats. Mr. Coia asked to clarify the enforcing of the Cease and Desist Order. Mr. Goldman stated that the enforcement action was put on the agenda by staff to enforce the Cease and Desist Order. Discussion on the term "tabling." Chair Tikoian asked Mr. Clarkin when the earliest Mr. Harris could be heard by the East Greenwich Town Council. Mr. Clarkin stated that he could be heard as early as two weeks. Chair Tikoian requested that the Town hear the case at the earliest possible time so that Mr. Harris had the opportunity to not miss the season. Hearing no other comments, Chair Tikoian asks for vote on motion to table. Motion carries on unanimous voice vote.

Chair Tikoian calls for recess at 7:39 p.m. Meeting resumes at 7:48 p.m.

7. Public Hearing on Changes to the Rhode Island Coastal Resources Management Program before the Full Council:

Ocean Special Area Management Plan: Chapter 7: Marine Transportation, Navigation and Infrastructure

Mr. Fugate stated that Chapter 7 had been through the lengthy process including the addition of the Public workshop as suggested by Save The Bay. Mr. Fugate stated that there are some suggested changes that appear in some of the policy documents as a result of discussions between NOAA and the team.

Tiffany Smythe gave power point presentation regarding OSAMP Chapter 7. There were no questions. Chair Tikoian thanked the OSAMP team stating that the Council is pleased with the progress being made. Chair Tikoian closed the public hearing. Director Sullivan motioned, seconded by Mr. Coia, for approval of the OSAMP Chapter 7. Motion carried on unanimous voice vote.

8. CATEGORY "A" LIST

None were held.

Motion to adjourn by Mr. Coia, seconded by Vice Chair Lemont.
Meeting adjourned at 8:08 p.m.

Respectfully submitted,
Grover Fugate, Executive Director

Reported by Lisa A. Mattscheck